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No. 86-637

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMUNICATIONS WORKERS OF AMERICA
and ITS LOCALS 2100, 2101, 2108, and 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Section 8(a)(3) of the National Labor Relations Act, as amended ("NLRA"), generally prohibits discrimination on the basis of union membership; by virtue of a proviso to that section, the prohibition does not extend to collective bargaining agreements that contain a "union security" provision which conditions continued employment with the employer on the covered employees' payment to the union that is their duly-selected exclusive bargaining representative of an amount equal to "the periodic dues and the initiation fees uniformly required" of union members. The question presented here is:

Whether an employee of a private-sector employer in an industry to which the NLRA applies states a good federal cause of action, under either the NLRA or the First Amendment, by the claim that the union acting as the employee's exclusive representative expends money collected pursuant to a union security provision for purposes to which the employee objects? *

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* In addition to the parties listed as petitioners in the caption to this petition, the following entities were listed as appellants-cross-appellees in the court of appeals: CWA Committee on Political Education; Local 2350, CWA; AFL-CIO; AFL-CIO Committee on Political Education; Maryland State AFL-CIO; American Telephone & Telegraph; and C&P Telephone Company of Maryland. (Each of these parties was named as a defendant in the district court, but the case was dismissed or settled as to each of the above-listed parties in the district court, and none is a petitioner here.)

In addition to the individual listed as respondent in the caption to this petition, the following additional individuals were appellees-cross-appellants in the court of appeals and are respondents in this Court: Dorris R. Ambrose; Jacqueline S. Brandon; Mary Anna Cox; Sally B. DiMauro; Rue T. F. Downey; Kathleen A. Heil; John J. Hurley; Harriett Lipschultz; Clay B. Lutz; Barbara McGaughgey; Ronald R. Merkle; Ethel T. Merryman; Doris J. Morrow; Marion F. Northrop; Frances M. Phyllis; Vivian Reedy; Barbara A. Russell; Lois A. Stallings; and Harry B. Swartz, Sr.

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v.

HARRY E. BECK, JR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Communications Workers of America, et al., petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the decision and judgment in *Beck v. Communications Workers*, 4th Cir. No. 83-1955 (September 12, 1986).

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc*, is not yet reported, and is reprinted in the Appendix to this Petition at 1a-28a. The opinion of the court of appeals' panel that heard the case is reported at 776 F.2d 1187, and is reprinted at App. 29a-106a. The opinion and order of the district court granting partial summary judgment to plaintiffs and referring the case to a special

master for remedial determinations is reported at 468 F.Supp 93 and is reprinted at App. 135a-142a. The first report of the special master is unreported and is reprinted at App. 239a-310a. The opinion of the district court on appeal from that report remanding the case to the special master for further determinations is not officially reported, is unofficially reported at 106 LRRM 2323, and is reprinted at App. 127a-134a. The supplemental opinion of the special master is not reported and is reprinted at App. 160a-238a. The opinion of the district court affirming the special master's determinations is not reported and is reprinted at App. 112a-127a. The opinion of the district court on a motion to reconsider is unreported and is reprinted at App. 110a-112a.

JURISDICTION

The *en banc* opinion and judgment of the court of appeals was entered on September 12, 1986. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted at pp. 1a-3a of this petition.

STATEMENT OF CASE

In accordance with the procedures set forth in § 9 of the National Labor Relations Act, as amended, 29 U.S.C. § 159 ("NLRA" or "the Act"), the Communications Workers of America ("CWA"), petitioner herein, was selected by the employees of the American Telephone and Telegraph Company and various of its subsidiaries ("AT&T"), to be their exclusive bargaining representative. CWA chartered several local unions, co-petitioners herein, to assist CWA in representing the AT&T employees. (CWA and the local petitioners are collectively referred to below as "the Union".)

This action was commenced on June 3, 1976 by twenty individual plaintiffs, respondents herein, who at all times relevant were employed by AT&T and who elected not to become union members. Pursuant to collective bargaining agreements between the Union and AT&T, all persons represented by the Union, including nonmembers, are required, as a condition of employment, to pay to the Union an "agency fee" in an "amount equal to the periodic dues" paid by union members.[1] Plaintiffs' complaint alleges that this "union security" clause deprives plaintiffs of a variety of common law, statutory, and constitutional rights.[2]

On March 16, 1979, the district court, acting *sua sponte*, granted partial summary judgment to plaintiffs. That court concluded that "collect[ing] from the plaintiffs amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment . . . violates the First Amendment rights of the plaintiffs," even though the collection is pursuant to a collec-

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[1] Pursuant to a policy adopted by the CWA in 1974, any member or non-member who objects to the expenditure of his money "for activities or causes primarily political in nature," is entitled to a refund of the portion of his money which is so expended. App. 147a n.5. For a description of a more recent version of the CWA policy *see Robinson v. New Jersey*, 741 F.2d 598, 614 (3d Cir. 1984), *cert. denied*, —— U.S. ——, 53 L.W. 3599 (1985).

[2] Union security clauses are of two general types. "Agency shop" agreements require those employees who are covered to pay an "agency fee" in an amount equal to union dues; "union shop" agreements require the covered employees to become members of the union and pay union dues within a specified period of time after hire. But under the NLRA "membership" has been "whittled down to its financial core," which is to say that "membership, insofar as it has significance for employment rights, may . . . be conditioned only upon payment of fees and dues." *NLRB v. General Motors*, 373 U.S. 734, 742 (1963). Accordingly, "although a union shop denies an employee the option of not formally becoming a union member, under federal law it is the 'practical equivalent' of an agency shop." *Abood v. Detroit Board of Education*, 431 U.S. 209, 217 n.10 (1977).

[Continued]

tive bargaining agreement between two private parties. App. 141a. To support that conclusion the district court cited *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a case involving a collective agreement between a public employer and a union. *See* App. 140a.

In its partial summary judgment order, the district court ruled that the Union was required "to refund to each plaintiff for every year since January 1, 1976, an amount reflecting that portion of his dues-equivalent agency fees which was spent for purposes other than collective bargaining, contract administration, and grievance adjustment." *Id.* at 142a. The district court referred the case to a special master to determine the amount of the refund.

Following protracted proceedings—which consumed over four years and generated over 4,500 pages of testimony and over 4,000 exhibits, *see id.* at 172a, 249a—the master found, and the district court ruled, that largely because the Union "did not keep [its] books of accounts upon any theory of separation of items" between collective-bargaining expenditures and other expenditures, *id.* at 251a, the Union was unable to prove by "clear and convincing evidence" (the burden of proof the master and district court placed on the Union) that more than 21% of its funds in the years prior to 1981 had been expended on matters germane to collective-bargaining. *See id.* at 120a-23a. The district court therefore ordered the Union to refund 79% of the monies that had been paid by plaintiffs during these years. The district court also ordered the Union to implement a complex system of recordkeeping, accounting and auditing—developed by a battery of public accountants retained by the Union—to determine for each subsequent year the proportion of the Union's revenues that is expended as activities unrelated

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[2] [Continued]

For that reason, in this petition we use the generic term "union security agreement" to refer to agency shop and union shop agreements.

to collective bargaining. *See id.* at 108a. And the district court retained jurisdiction to review each year the Union's calculation of "the non-retainable amount." *Id.* at 109a. (In the three years since this system has been implemented, the Union's improved recordkeeping system has shown that the Union expends between 80% and 85% of its income on matters germane to collective bargaining.)

The Union appealed the district court's judgment to the United States Court of Appeals for the Fourth Circuit, and plaintiffs cross-appealed with respect to certain limitations on the remedy the district court had ordered. On the Union's appeal the parties addressed not only the constitutional issue that the district court had resolved but also a quasi-statutory argument that plaintiffs raised in the appellate court as an alternative basis to support the district court's judgment: that "'to avoid serious doubt of the[] constitutionality'" of § 8(a)(3) of the NLRA, the court of appeals could "find that [the Union] violated the implied terms" of that section by requiring nonmembers, as a condition of employment, to pay, over objection, an agency fee equal to union dues. Pl. Br. in C.A. No. 83-1955 at 33-34. The Union's appeal also challenged the district court's calculation of the amount of the refund awarded to the individual plaintiffs.

On October 24, 1985, a panel to the Fourth Circuit, by a 2-1 vote, affirmed the district court's judgment as to liability, agreeing with "both the statutory and constitutional claims of plaintiffs." App. 72a. The only respect in which the panel majority concluded that the district court had erred was in applying an "improper standard of proof," *id.* at 74a, —the clear and convincing evidence standard—in determining the proportion of the Union's expenditures that were attributable to activities germane to bargaining. The panel majority thus remanded the case for a redetermination of the amount of the refunds owed the plaintiffs, applying the proper evidentiary standard to disputed factual issues, *see id.*

at 79a-80a, but in all other respects the panel majority affirmed the district court's judgment.

The Union thereafter filed a petition for rehearing and a suggestion for rehearing *en banc* which the court of appeals granted. On September 12, 1986, a deeply divided *en banc* court reaffirmed the district court's judgment in relevant part.

In reaching this result, the majority of the *en banc* court was unable to agree upon a rationale, and, indeed, five of the six judges who voted to affirm, chose not to author, or join in, any opinion explicating their views. Instead, the *en banc* court issued a brief, *per curiam* order/decision which tallies the votes of the judges as follows:

On the question whether § 8(a)(3) should be construed to prohibit agreements which condition continued employment on the payment of agency fees equal to union dues, the court of appeals split 5-5 with Judges Russell, Widener, Ervin, Chapman and Wilkinson voting for such a construction, and Judges Winter, Hall, Phillips, Sprouse, and Murnaghan reaching the contrary conclusion. App. 5a-6a.

On the question whether a union security provision, when contained in a collective bargaining agreement between two private parties, constitutes state action so as to implicate the First Amendment, two judges (Russell and Chapman, who had formed the panel majority) so found; five judges (Winter, Hall, Phillips, Sprouse, and Murnaghan) reached the opposite conclusion; and three judges (Widener, Ervin and Wilkinson) declined to reach the issue. *Id.*

Finally, the *per curiam* order/decision of the *en banc* court recites that Judge Murnaghan, "speaking for himself, in a separate concurring opinion filed along with this order and opinion" concludes that requiring nonmembers to pay a dues-equivalent fee "violat[es] . . . the union's statutory duty of fair representation, under *Vaca v. Sipes*, 386 U.S. 171 (1967), but he agree[s] with the

dissenting panel opinion insofar as it would deny [plaintiffs' claims] on either the statutory or the constitutional grounds." App. 5a.[3] The *per curiam* therefore concludes:

> The result is that six Judges of the Court voted to sustain federal jurisdiction over the cause, though in some instances on somewhat varying grounds. [*Id.* at 6a.]

With respect to the remedial issues, the *en banc* court's order/decision states that "[t]here was apparently no difference within the Court . . . that the majority panel opinion's disposition of the allocation issue was properly resolved." *Id.* Accordingly, "the result of the *en banc* consideration is the affirmation by the *en banc* court of federal jurisdiction over the cause and of the majority panel's determination on the allocation issue." *Id.*

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[3] It is not entirely clear whether the other five members of the Fourth Circuit who voted to affirm the district court's judgment embraced Judge Murnaghan's reasoning with respect to the fair-representation issue. (The dissenters—Judges Winter, Hall, Phillips, and Sprouse expressly disagreed with Judge Murnaghan in an opinion authored by Judge Winter.) The panel majority, in its opinion, had concluded that respondents "have stated a good cause of action for a violation of . . . the duty of fair representation," but the panel majority's theory, as Judge Murnighan noted in his concurrence, was that "a breach of the duty of fair representation follows *automatically* from a violation of § 8(a)(3)." App. 7a n.3 (emphasis added). Judge Murnaghan, in contrast, found a fair representation violation even though in his view the union security clause does *not* violate § 8(a)(3). *See* App. 8a-9a. Thus, whereas the panel majority treated the duty of fair-representation as merely providing an additional *remedial* basis for this action, Judge Murnaghan viewed the duty as of independent legal significance here.

The *per curiam* decision of the *en banc* court recites that five judges (including the two judges who formed the panel majority) would find a violation "under § 8(a)(3) and . . . the duty of fair representation," App. 5a, but that decision does not indicate whether those judges viewed the duty as of substantive or remedial significance in this context. The *per curiam* decision does state that Judge Murnaghan, in his concurring opinion, is "speaking for himself," *id.*, and Judge Murnaghan viewed himself "to be out of step with everyone but Johnny," *id.* at 9a. On the other hand, the *per*

REASONS FOR GRANTING THE WRIT

Introduction

Although the court of appeals was unable to agree on a single rationale, that court's holding is unmistakable: union security agreements negotiated by private parties in industries covered by the NLRA are unlawful to the extent such agreements condition continued employment on the payment to the union of an amount equal to union dues by an employee who objects to financing the union's activities outside the area of what the courts determine to be " 'collective bargaining, contract administration and grievance adjustment.' " App. 131a-132a. That holding is in square conflict with the decision of the United States Court of Appeals for the Second Circuit in an identical case, *Price v. Auto Workers*, 795 F.2d 1128 (2d Cir. July 16, 1986), which was issued almost contemporaneously with the *en banc* decision in the instant case, and in which a unanimous panel (Cardamone, Pratt, and Miner, JJ.) denied objecting employees "relief from paying full dues and fees under a union security clause contained in the collective bargaining agreement between their employer [General Dynamics Corporation] and their union [the United Auto Workers]." *Id.* at 1130. *Price* rejects each reason advanced by one or more of the judges in the majority below for overturning such union security agreements.[4]

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curiam decision refers to Judge Murnaghan's reasoning in approving terms. *See id.* at 5a n.2 (stating that while the panel majority relied on the duty of fair representation, it did not offer "the same depth of reasoning and perception as does Judge Murnaghan's concurring opinion").

It is not necessary (and so far as we can see not even possible) to determine how many members of the Fourth Circuit concur with Judge Murnaghan's reasoning. It is enough to note that given his vote, one of the questions necessarily presented here is whether the negotiation or enforcement of a union security clause constitutes a breach of the duty of fair representation. *See* pp. 19-24, *infra*.

[4] The panel of the Fourth Circuit that heard this case below recognized the "similar[ity]" between the instant case and *Price*,

This conflict between the circuits concerns legal issues of great practical importance. The NLRA is the nation's basic labor statute, covering virtually the entire private employment sector. Although § 14(b) of the Act, 29 U.S.C. § 164(b), permits the states to proscribe union security agreements, thirty states, with two-thirds of the United States' population, have elected not to do so.[5] In those states, over ninety percent of collective bargaining agreements in industries to which the NLRA applies contain such provisions,[6] and over 6,000,000 workers in those industries are covered by such agreements.[7] Simply stated, then, at stake here is the legality of thousands of collective bargaining agreements covering millions of workers, and the rights and duties of workers, unions and employers under those agreements.[8]

In order to decide whether private-sector union security agreements in NLRA industries are lawful, three issues, addressed by one or another of the judges below and by the Second Circuit in *Price*, must be resolved: (1) should § 8(a)(3) be read to proscribe such agree-

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which at that time was *sub judice* in the Second Circuit. App. 69a n.28.

[5] AFL-CIO, *Economic Comparisons Between Open Shop States and Free Collective Bargaining States*, p. 1 (Oct., 1986).

[6] Bureau of National Affairs, *Collective Bargaining; Negotiations and Contracts* at 87-3 (1986).

[7] United States Department of Labor, *Characteristics of Major Collective Bargaining Agreements*, January 1, 1980, at 1, 3, 23-24.

[8] In contrast, the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), covers under 1,000,000 workers, many of whom are not unionized. *See* Bureau of Labor Statistics, *Employment and Earnings* at 186 (Jan. 1986). Nonetheless this Court has issued four decisions on whether, and to what extent, labor unions in the industries covered by that Act may, consistent with § 2, Eleventh of the RLA, 45 U.S.C. § 152, Eleventh, and the First Amendment negotiate and enforce union security agreements. *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

ments; (2) does a union breach its fair representation obligation by negotiating and enforcing such an agreement or expending the money of objecting fee-payers under such an agreement; and (3) do such agreements implicate the state and therefore the First Amendment? As we show below: this Court has never had occasion to answer any of these questions; each deeply divided the Fourth Circuit; on each question the answer proffered by those judges who were in the majority below conflicts with the unanimous determination of the Second Circuit in *Price*; and on at least the latter two questions, the answer proffered below conflicts as well with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Kolinske v. Auto Workers*, 712 F.2d 471 (D.C. Cir. 1983).

Thus, from the standpoint of both legal doctrine and the practicalities of the situation, this case merits plenary consideration by this Court.

I. THE NLRA § 8(a)(3) QUESTION

A. NLRA § 8(a)(3) makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term of condition of employment" on the basis, *inter alia*, of union membership. That prohibition is subject to two provisos. The first saves union security agreements from condemnation by providing that

> nothing . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if such labor organization is the representative of the employees . . .

The second proviso qualifies the first by declaring, in pertinent part, that

> no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing

> that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Notwithstanding this statutory language which, on its face, allows for agreements which condition continued employment on the payment of "periodic dues" to support the full range of a union's dues-financed activities, five members of the court below concluded that such an agreement violates § 8(a)(3). Although these five judges did not explicate their views on rehearing *en banc*, we may fairly assume that the judges who reached this conclusion (two of whom sat on the original panel) subscribed to the reasoning of the panel majority which found that this Court's decisions in *Machinists v. Street*, *supra*, 367 U.S. 740, and its progeny interpreting § 2, Eleventh of the RLA controlled the interpretation of § 8(a)(3) of the NLRA as well. The panel majority stated:

> [I]t would be difficult, if not impossible, to find two statutes more identical in language and legislative purpose than section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA. It is inconceivable that two such statutes would be construed differently. For this reason, it seems fair to assume that the construction given one by the Supreme Court would be equally applicable to the other, and we proceed on that basis in construing section 8(a)(3). [*App.* 49a.] [9]

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[9] The panel majority was so taken with its NLRA-RLA analogy that the majority found an implied cause of action under § 8(a)(3), notwithstanding the exclusive primary jurisdiction of the National Labor Relations Board. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). The panel majority stated:

> [A]s we have seen, the two statutes are to be construed alike and both give to objecting employees the same rights. If there was jurisdiction under section 1337 over a statutory claim under section 2, Eleventh in *Ellis* . . . by the same token there is jurisdiction over the statutory claim under section 8(a)(3)

B. This Court has never confronted the question whether NLRA § 8(a)(3) is properly equated with RLA § 2, Eleventh in this regard. As Judge Winter reminded in his dissenting panel opinion, with which four other members of the *en banc* court expressly agreed, this Court has cautioned that "'[e]ven rough analogies [between the RLA and the NLRA] must be drawn circumspectly with due regard for the many differences between the statutory schemes.'" *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). And as Judge Winter shows at length, the proposed equation between RLA § 2, Eleventh and NLRA § 8(a)(3) ignores at least two distinctions between the two statutes —distinctions which were critical to the *Street* Court's analysis.

1.(a) This Court has recognized that "*Street* embraced an interpretation of the Railway Labor Act not without its difficulties, precisely to avoid facing the constitutional issues presented by the use of union shop dues for political and ideological purposes unrelated to collective bargaining." *Abood*, 431 U.S. at 232. *See also Ellis*, 466 U.S. at 445-46. Those "constitutional issues" were presented in *Street* because "government action was present." *Abood*, 431 U.S. at 218-19, n.12. And that was true because "[u]nlike § 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), the Railway Labor Act preempts any attempts by a State to prohibit a union shop agreement" and to that extent affirmatively protects RLA union security agreements. *Abood*, 431 U.S. at 218-19 n.12. Indeed, several years prior to *Street*, in *Railway Employes' Department v. Hanson*, *supra*, the Court had expressly found that a union security agreement negotiated under the RLA poses "justiciable questions under the First and Fifth Amendments . . . since Congress by the union shop provision of the Railway Labor Act sought

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here. In short, jurisdiction can only be denied in this case if jurisdiction is to be denied in *Ellis*. [App. 63a-64a.]

to strike down inconsistent laws in 17 states." 351 U.S. at 231-32. The *Hanson* Court elaborated:

> As already noted, the 1951 amendment [to the RLA], permitting the negotiation of union shop agreements, expressly allows those agreements notwithstanding any law "of any State." A labor agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of the State. [351 U.S. at 232; footnotes and citations omitted.]

(b) As Judge Winter observed in his dissenting panel opinion below, "The basis for finding government action in *Hanson*—the federal imprimatur, or mark of approval on agency shop agreements that the Supreme Court discerned in the preemption of all contrary state law—is lacking in the NLRA." App. 103a.[10] Accordingly, unless there were some *other* basis for finding state action here, the considerations that impelled the *Street* Court to adopt an interpretation of RLA § 2, Eleventh "not without its difficulties" so as to avoid "constitutional questions . . . of the utmost gravity," *Street*, 367 U.S. at 749, would not be implicated in this case, and *Street* would not control the interpretation of NLRA § 8(a)(3).

The panel majority, although resting on the supposed similarities between §2, Eleventh and § 8(a)(3), hypothesized as an alternative basis for decision two grounds for finding the state implicated in a union security agreement between private parties in an NLRA-regulated industry: first, that § 8(a)(3) " 'authorizes an employer and a

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[10] For other appellate court decisions making the same point on the distinction between the RLA and the NLRA, *see Reid v. UAW*, 443 F.2d 408 (10th Cir. 1971); *Kolinske v. Auto Workers*, 712 F.2d 471 (D.C. Cir. 1983). *But see Seay v. McDonnell-Douglas*, 427 F.2d 996 (9th Cir. 1970) (§ 8(a)(3) and § 2, Eleventh "are for all purposes here, the same"); *Linscott v. Miller Falls Co.*, 440 F.2d 14, 16-17, 19-20 (1st Cir. 1971). *See also* n.14 *infra*.

union to enter into union shop agreements' " and thereby " 'cast[s] the weight of the Federal Government behind the agreements' "; and, second, that the union's authority to negotiate such agreements "is grounded directly on the power given [the union] as a result of its status as bargaining representative." App. 70a.[11] Each of these theories of state action runs directly contrary to governing precedents of this Court.

(i) The only sense in which NLRA § 8(a)(3) "authorizes" union security agreements is that, by virtue of its proviso, such agreements are saved from condemnation by that section's general prohibitory words. *See* pp. 10-11 *supra*. The proposition that the state-action doctrine turns on the technicality of whether a general prohibition is drafted so as not to reach certain private conduct or is drafted so that a proviso leaves the conduct unregulated is, we submit, fundamentally unsound. Rather, as this Court has so recently emphasized, to find state action, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible" and the "party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). "Mere approval or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives." *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982). Yet the very most that can be said about NLRA § 8(a)(3)'s treatment of union security agreements is that the law "acquiesces" in such privately-negotiated agreements. As Judge Winter observed:

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[11] The three judges who joined with the two members of the panel, on rehearing *en banc*, to find a § 8(a)(3) violation (Judges Widener, Ervin, and Wilkinson), did not join in the panel majority's finding of state action. It is thus not clear whether these three judges viewed *Street* as controlling and, if so, why.

> Nothing in the NLRA compels the adoption of an agency shop agreement; the Act simply provides that federal law does not "preclude" such an agreement between an employer and its employees' bargaining representative. Nor does the Act preempt contrary state law; it merely permits agency shop agreements where there is no state "right to work" law. As the Senate Report on the original NLRA noted, "the bill does nothing to facilitate closed-shop agreements or to make them illegal in any State where they may be illegal." [App. 99a; dissenting opinion.]

(ii) The alternative theory of state action propounded below—that the state is involved because the NLRA vests unions with the authority to act as exclusive representative—fares no better:

> Monopoly status, which is what the right to be the exclusive bargaining agent gives the union, is by itself insufficient to make a private party's acts state action. This issue was settled in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The Supreme Court there held that government-conferred monopoly power alone was insufficient to establish state action in the context of a due process claim against an electrical utility. The Court refused to find state action in suits against state-created monopolists where "there was insufficient relationship between the challenged actions of the entities involved and their monopoly status." [App. 100a; dissenting opinion.]

Indeed, if a union's status as exclusive representative under the NLRA sufficed to transform the union's actions into state actions, then every act of an exclusive representative—and every provision of a collective bargaining agreement negotiated by such a representative—would be attributable to the state. Yet this Court has squarely rejected that proposition on at least two occasions. *See Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) (affirmative action plan in collective bargaining agreement not subject to Fourteenth Amendment scrutiny

because the agreement "does not involve state action"); *Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n. 16 (1982) (union adoption of rules limiting contributions to candidate for union office "does not involve state action" even though "Congress has endowed labor unions with extraordinary authority").[12]

(c) In sum, there is no substantial basis for imputing a union security agreement, negotiated by private parties in an industry which is covered by the NLRA, to the state, and thus, in contrast to § 2, Eleventh of the RLA, there is no need to seek a construction of § 8(a)(3) of the NLRA which would avoid "constitutional questions . . . of the utmost gravity." Accordingly, *Street* is not a controlling precedent here.

2. There is a second reason why *Street* is not controlling: in Judge Winter's words, "careful comparison of the NLRA and RLA shows that the two provisions differ in terms of language, legislative history and statutory purpose." App. 92a-93a; dissenting opinion.

In *Street*, as Judge Winter noted, the Court placed great stress on the fact that before § 2, Eleventh was amended in 1951, the RLA "embraced a 'policy of complete freedom of choice of employees to join or not to join a union,'" and prohibited any form of union security. App. 93a, *quoting Street*, 367 U.S. at 750. The *Street* Court found that in amending that prohibition in 1951, Congress remained "'concern[ed] over possible impingements on the interests of individual dissenters from union policies,'" and Congress made "'inroads'" on the "'policy of full freedom of choice'" for the "'limited purpose of eliminating the problem created by the "free rider,"'" App. 95a, *quoting Street*, 367 U.S. at 767. The *Street*

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[12] *See also Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950) ("We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such"); *Black v. Cutter Laboratories*, 351 U.S. 292, 298-99 (1956).

Court concluded that requiring RLA agency-fee payers to support, over objection, political or ideological activities unrelated to collective bargaining went beyond the "limited" inroads made by § 2, Eleventh, and was not authorized by that section.

"[T]he legislative history and purpose of the NLRA and Taft-Hartley Act do not permit the same interpretation of § 8(a)(3)." App. 95a (dissenting opinion):

> First, the NLRA never embraced the 1934 RLA's policy of "complete freedom of choice of employees to join or not to join a union" that "survived in § 2, Eleventh." *Street*, 367 U.S. at 750, 767. Rather, the NLRA's policy has been to leave the question of union shop agreements to state law. . . .
>
> Second, the Taft-Hartley Act's legislative history, unlike the RLA's, is unambiguous on the issue of limiting the use of union shop fees. Congress explicitly considered the problem of unions using compelled fees when it enacted the Taft-Hartley Act in 1947. Its response was to prohibit union spending in the particularly sensitive area of federal elections. It explicitly rejected amendments requiring more thorough-going supervision of union shop fees, however, as unjustifiably intrusive and unmanageable. We should respect this Congressional intent in construing § 8(a)(3). [App. at 95a-96a; dissenting opinion.]

Thus, the fact that it was, in *Street*, "fairly possible" and, indeed, "reasonable," 367 U.S. at 750, to view the RLA as limiting the type of union-security arrangements that are lawful in the rail industry does not mean that a like interpretation of the NLRA is "possible," let alone "reasonable." That question—and thus the proper interpretation of NLRA § 8(a)(3)—is an open one in this Court.

C. Insofar as the decision below holds that NLRA § 8(a)(3), like RLA § 2, Eleventh, prohibits union secu-

rity agreements which condition continued employment on the payment of an agency fee equal to the full amount of union dues, that decision is in square conflict with the Second Circuit's decision in *Price*. The *Price* court expressly recognized that the panel in the instant case "sought to harmonize the construction of these two statutes," and the *Price* court stated, "[w]e respectfully disagree with the *Beck* majority's analysis of this issue." 795 F.2d at 1132. Following the lead of the D.C. Circuit in *Kolinske*—which had concluded that the state-action theory of *Street* " 'has no applicability to the National Labor Relations Act,' " 712 F.2d at 476 [13]—the *Price* court found *Street* not to be controlling because "the RLA's preemption of contrary state law was the heart of the . . . finding of government action" in *Hanson* and *Street* and the NLRA "contains no similar preemption of state law." 795 F.2d at 1332. And just as *Kolinske* held that "the decision to accept an agency shop clause . . . is not a governmental act," 712 F.2d at 480, the *Price* court concluded that there was no other basis for finding state action in a union security agreement between private parties in an NLRA industry because

> in enacting the NLRA, Congress mapped out the background and parameters of possible private action, but required nothing with respect to the particular wrong complained of here. When a private party makes the ultimate choice within a range of options offered by the government, state action generally is not implicated. Since the union security clause was a product of private negotiations [it] was

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[13] The state action issue arose in *Kolinske* because the plaintiff there, an agency-fee payer, claimed that his union's refusal to provide him with strike assistance unless he participated in strike activities deprived plaintiff of his First Amendment rights; to find state action the plaintiff relied on the fact that he was paying dues to the union pursuant to a union security agreement permitted by § 8(a)(3). As explained in text, the D.C. Circuit rejected that state-action claim.

not attributable to the government . . . [795 F.2d at 1133.] [14]

II. THE FAIR REPRESENTATION QUESTION

A. In his concurring opinion on rehearing *en banc*, Judge Murnaghan concluded that a "union must use the fees collected from employees only for purposes within the scope of the [principal]-agen[t] relationship" between employees and their union, App. 17a, and that "absent express authorization of nonmember employees," *id.* at 17a n.10, the "expenditure[s] of agency fees collected from nonmembers for non-collective bargaining purposes violates the duty of fair representation," *id.* at 21a.[15] It is not clear whether any other member of the lower court subscribed to Judge Murnaghan's theory. *See* n.3, *supra*.

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[14] In a decision which predates this Court's state-action rulings in *Jackson*, *Lugar*, and *Blum*—rulings on which *Kolinske* and *Price* heavily rely—the Tenth Circuit concluded that union security agreements in NLRA industries cannot be imputed to the state, *Reid v. UAW*, *supra* n.10, and the First and Ninth Circuits reached the opposite conclusion, *Linscott v. Miller Falls Co.*, *supra* n.10; *Seay v. McDonnell-Douglas*, *supra* n.10. These three circuits have not had occasion to reconsider their decisions in light of this Court's more recent teachings, and thus it is not altogether clear whether *Linscott*, *Reid* and *Seay* are still good law in their respective circuits. There is no reason to believe, however, that the Tenth Circuit would reconsider its decision in light of the support that decision derives from this Court's recent rulings, and thus we believe the decision below, insofar as it relies on a state-action finding, may fairly be viewed to be in conflict with *Reid*, as well as with *Kolinske* and *Price*. If *Linscott* and *Seay* were still good law in the First and Ninth Circuits, then those courts would be aligned with the court below in disagreeing with the *Price-Kolinske* approach.

[15] Judge Murnaghan deemed it "not necessary now to decide whether the scope of the union's agency function—and hence the extent of its permissible use of employee funds—is the same with respect to union members . . ." App. 17a.

B. In his dissenting opinion on rehearing *en banc*, which three other judges joined, Judge Winter criticized Judge Murnaghan's opinion on two grounds.

First, Judge Winter reasoned that because the duty of fair representation concerns "irrational, unequal, unfair treatment of a member of the bargaining unit," that duty "hardly seems applicable where the union's challenged expenditures were made equally on behalf of all members of the collective bargaining unit, dues paying members and agency-fee paying nonunion members alike," and where there is no "proof that the union acted arbitrarily, discriminatorily, or in bad faith in spending its revenues." App. 24a; dissenting opinion.

Second, Judge Winter concluded that "the duty of fair representation, derived from § 9 of the Act, cannot be transgressed if a union does only what Congress has intentionally refrained from prohibiting it to do," and that "Congress specifically intended not to regulate the expenditure of union dues except in minor respects." App. 24a, 26a; dissenting opinion:

> Congress considered the arguments of those who wished to prohibit all union security agreements, and those who wished to retain all such agreements, including the "closed shop." Senator Taft [the principal sponsor of the Labor-Management Relations Act in which § 8(a)(3) was enacted in its present form] took a middle position, distinguishing between the closed shop and the "union shop." Under his compromise, an employee could work at a unionized facility without acquiring membership, but only as long as he "pa[id] the same dues as other members of the union." 93 Cong. Rec. S. 4400 (daily ed. April 30, 1947), *reprinted in* 2 Legislative History of the Labor-Management Relations Act, 1947, at 1142 (1948). Senator Taft explained that the bill thus prohibited the closed shop and guaranteed that a worker could "get a job without joining the union or asking favors of the union . . ." 2 Legislative History, *supra*, at 1422. Once assured of this right

to work without union membership, however, Senator Taft asserted that "[t]he fact that the employee will have to pay dues to the union seems . . . to be much less important." 2 Legislative History, *supra*, at 1422. *See also id.* at 1010-11, 1096-97, 1403 (remarks of Senator Taft). Thus, the compromise that became law was intended to permit union security agreements requiring nonmembers to tender the same dues to the union that members regularly paid. So far as payments to the union were concerned, members and nonmembers were on a parity and treated alike. [App. at 27a; dissenting opinion.] [16]

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[16] Judge Murnaghan attempted to dismiss the legislative history on which Judge Winter relied in two principal ways.

First, Judge Murnaghan contended that "the legislative history indicates merely that Congress chose not to restrict unions' expenditures of employees' funds through the use of unfair labor practice provisions" but that the legislative history does not "preclude the development of such restrictions by the courts under the principles of the duty of fair representation." App. 19a. As Judge Winter responded, however, "stringent regulation was rejected [by Congress] as a matter of legislative judgment and not because of any thought that regulation was unnecessary because [of] the judicial doctrine of fair representation," and "[i]t is disingenuous to assert that the members of Congress who vigorously debated the union security provision of § 8(a)(3) were aware that regardless of their legislative compromise, the judiciary remained free to imply additional limitations under the duty of fair representation." App. 25a & n.4.

Second, Judge Murnaghan asserted that although "Senator Taft endorsed the union shop . . ., the union shop is not the same as the agency shop," and that the legislative history has "no bearing on agency shops or agency fees." *Id.* at 20a n.14. Judge Winter responded:

> I think it sheer sophistry to assert that Congress decided on a very limited regulation only with respect to dues from union members and not also with respect to agency fees. Agency fees are the equivalent of union dues, and it is inconceivable to me that Congress specifically intended not to regulate the expenditure of union dues except in minor respects but, by mere silence, intended the expenditure of agency fees to be regulated under the judicial doctrine of the duty of fair representation. [*Id.* at 25a-26a.]

C. Insofar as the decision below rests on Judge Murnaghan's fair representation theory, that decision once again is in square conflict with *Price* and *Kolinske*.

In *Price*, the Second Circuit concluded that the "mere negotiation" of a union security clause "does not breach the duty of fair representation" because Congress "authoriz[ed] such clause in . . . § 8(a)(3)" and it "strains logic to suggest that the union breached its duty of fair representation by negotiating into the collective bargaining agreement a statutorily authorized provision." 795 F.2d at 1135. The *Price* court likewise determined that a union "cannot be said to have breached its duty of fair representation because it seeks to enforce the union security clause it has successfully negotiated," as it "would be absurd to suggest that parties to a collective bargaining agreement could negotiate but then could not enforce such a provision." *Id.* Finally, the *Price* court held that expending the fees of nonmembers, along with the dues of members, on activities unrelated to collective bargaining—for example, on "recruitment, insurance plans, strike funds, scholarship funds, union publications, and litigation"—does not breach the fair representation duty as these are "activities regularly engaged in by modern unions" and "it is not arbitrary . . . to fund such activities." *Id.* at 1135-36. That court added:

> Furthermore, there is no claim here that these expenditures were motivated by any discriminatory animus. Appellants do not allege that they are being treated differently from other union members; on the contrary, their contention is that, in this instance, they *should* be treated differently because they disagree with the views of those who joined the union voluntarily rather than under the compulsion of the union security clause. Without some showing of discriminatory animus, however, resolution of internal disagreements on how union funds should be spent does not implicate the duty of fair representation. [*Id.* at 1136; emphasis in the original.]

Judge Murnaghan's reasoning is also inconsistent with the holding of the D.C. Circuit in *Kolinske*. In addition to asserting a First Amendment claim, *see* p. 18, *supra*, the plaintiff there alleged that the union had breached its duty of fair representation by refusing to pay him strike benefits unless he actively participated in the strike. Judge Tamm rejected that claim in *Kolinske* on the ground that the manner in which a union decides to expend its funds does not implicate the duty of fair representation:

> Arising as it does out of a union's privilege under section 9(a) of the NLRA to serve as the employee's exclusive representative, the duty of fair representation is co-extensive only with the power of exclusive representation. As we have earlier noted, "a union . . . can be held to represent employees *unfairly* only in regard to those matters as to which it represents them *at all*—namely, 'rates of pay, wages, hours . . ., or other conditions of employment'." In other words, the duty of fair representation extends only to matters involving an employee's dealings with his employer and ordinarily does not affect an employee's relationship with the union structure. [712 F.2d at 481; citations omitted.] [17]

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[17] Judge Murnaghan attempted to reconcile his reasoning with *Kolinske* on the ground that "[t]he union's refusal to pay strike benefits to a nonmember who refused to participate in strike activities was properly characterized as an internal union matter because the authority to make and enforce that decision lay solely with the union," whereas here "the collection of agency fees from employees who are *not* union members can hardly be characterized as a purely internal union matter." App. 16a n.8 (emphasis in original). But the breach of the duty that Judge Murnaghan found in this case related to the union's *use* of the plaintiffs' agency fees and *not* the collection as such: "the union must *use* the fees collected from employees only for purposes within the scope of the agency relationship." *Id.* at 17a (emphasis added). *See also Street*, 367 U.S. at 771 ("appellees' grievance [under the RLA] stems from the *spending* of their funds for purposes not authorized by the Act in the face of their objection, *not from the enforcement of the union-shop*

III. THE STATE ACTION/FIRST AMENDMENT QUESTION

The district court held that conditioning an employee's continued employment on the payment of an agency fee equal to union dues to support the full-range of union dues-funded activities infringes upon the First Amendment rights of employees who object to supporting such activities. The panel majority affirmed the district court in this regard, and the two judges who formed that majority adhered to the view on rehearing *en banc*.

A First Amendment violation, of course, pre-supposes the existence of state action. The question of whether the collective bargaining agreement involved here, which is solely between private parties, is to be imputed to the state is a question of general significance and one whose importance transcends the bounds of labor law. And as we showed in Part I, insofar as the decision below rests on a finding of state action, that decision runs directly contrary to decisions of this Court, and is in square conflict with the Second Circuit's decision in *Price*, and the D.C. Circuit's decision in *Kolinske*. *See also* n.14, *supra*.

* * *

In sum, each of the legal questions that must be faced in order to determine whether NLRA unions may negotiate and enforce union security agreements providing for the payment of an amount equal to union dues is a significant one which merits the Court's attention in its own right. For that reason, and in light of the practical stakes and the confusion and inequity generated by the conflict between the circuits, this case warrants plenary consideration by this Court.

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agreement by the mere collection of funds") (emphasis added). And here, as in *Kolinske*, the Union's decision as to how to expend the money it had collected "lay solely with the Union." Thus, Judge Murnaghan's attempt to distinguish *Kolinske* does not withstand analysis.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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STATUTORY PROVISIONS

STATUTORY PROVISIONS

Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3) provides as follows:

> It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has rea-

sonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), provides in pertinent part as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive repreesntatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment;

Section 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), provides in pertinent part as follows:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, provides in pertinent part as follows:

> Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor oganization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the

effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.